Supreme Court, U.S.
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No. 92-91

in the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

Gerry D. Dickens,
Petitioner,

v.

United Parcel Service, Inc., John Maldonado and C.E. Roarke,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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Rideau v. Parken Industrial Serv., Inc., 917 F.2d 892 (5th Cir. 1990) . . .3

Rules

Rule 15.6, Supreme Court Rules. 1

COMES NOW the Petitioner pursuant to Rule 15.6 of this Court's Rules and for Reply to the Respondent's Brief would submit the following:

I.

The Respondent (UPS) remarkably and candidly concedes that the Fifth Circuit used the wrong record in deciding this case. Respondent seems to argue, however, that because the correct record could somehow be read to support, at least in part, the opinion of the Fifth Circuit, then there is "no harm, no foul". This argument is totally wrong because there is nothing to indicate that the Fifth Circuit even used the correct record to review this case.

The Respondent asks this Court to do what the Fifth Circuit was supposed to do, i.e., to review the case using the

correct record, but then they distort that record and attempt to resolve all inferences in their favor as if they were attempting to support a final judgment rather than opposing one.

The Respondents' most obvious defect is the failure to even once address the crucial issue before this court which is the denial of procedural due process triggered by the Fifth Circuit's use of the mistrial transcript. In essence, by failing to join issue with the constitutional issue they tacitly agree with the Petitioner. They offer no constitutional excuse for the unconstitutional error of the Fifth Circuit.

II.

Even if this Court accepted the invitation of the Respondent to engage in a review of the actual trial transcript,

which it should not do until the Fifth Circuit correctly does so, their version of what that correct record shows is totally blurred.

UPS, like the Fifth Circuit before it, offers a one-sided analysis of the evidence presented to the jury in an attempt to minimize the deprivation of due process rights. Unfortunately for UPS, its analysis is skewed to the *wrong* side. In reviewing a judgment based on a jury verdict, the evidence, and all reasonable inferences therefrom, must be viewed in the light most favorable to the jury's findings. Gibraltar Savings v. L.D. Brinkman Corp., 860 F.2d 1275, 1297 (5th Cir. 1989), cert. denied, 490 U.S. 1091, 1092 S.Ct. 2432 (1989); Rideau v. Parken Industrial Serv., Inc., 917 F.2d 892, 897 (5th Cir. 1990).

Essentially, UPS's argument, and the opinion of the Fifth Circuit, rest upon a misinterpretation of evidence in four key areas: Dickens' presence at the loading dock, the empty box picked up by Dickens and the boxes in the trailer, the involvement of Scooter Williams and the phone call to the police station. When the evidence and inferences are viewed favorably with the jury verdict, the error, and resulting harm, rendered by the Fifth Circuit becomes apparent.

1. The Dock

The only important evidence about Dickens' activities that is truly "undisputed" is his physical presence at the loading dock on November 5, 1985. The "spin" placed on the remaining evidence by UPS is contrary to the jury's verdict.

The evidence showed that on November 5, 1986, Dickens performed his

routine job assignments as an employee at the UPS Westpark facility, including checking around the trailers at the loading dock (R.X: 37(line 19)-38(line 5); XI: 100(Line 24)-101(line 24)). This last assignment came from Dickens' supervisor, Ken Savannah, and was routinely given to hourly employees like Dickens (R.X: 37(line 18)-39(line 7), XI: 99(line 4-13), 101(line 19-24)). As part of this routine task, Dickens placed empty boxes and plastic bags, which he had been told to save and reuse, into a trailer to return to another UPS facility (R.XI: 105(line 15)-106(line 6), 141(line 6)-143(line 10), XII: 138(line 14-22)). In short, Dickens' activities were routine and required; as the jury reasonably concluded, his conduct was hardly "suspicious."

2. The Boxes

There is no evidence that the one empty box handled by Dickens later became one of the two boxes Maldonado claims he saw Scooter Williams take from a trailer. The inference indulged by UPS linking the boxes is unreasonable and contrary to the jury's finding.

Dickens never admitted that he handled more than one box. In fact, the Fifth Circuit was evidently confused on this issue since it found that Williams took one box and dropped two boxes (Op: 5) and later wrote that Williams dropped one box and left one in the trailer (Op: 8). Dickens was only seen with one box by Maldonado and Roarke (R.XII: 107(line 10-13), 108(line 11-24), 184(line 1-2)). Roarke could not identify the box handled by Dickens nor determine whether or not it

was empty (R.XII: 180(line 25)-181(line 7)).

Roarke also testified that there may have been other empty boxes in the trailer (R.XII 181(line 22-24)). Empty boxes were commonly left around the trailers (R. X: 41 (line 5-12)). Therefore, the jury could easily, and reasonably, infer that the empty box discarded by Dickens into the trailer was *still in the trailer* after Maldonado found the two boxes of jewelry.

A visual expert also discredited Maldonado's stated ability to identify persons and objects from his peephole (R.XI: 60 (line 20-25), 63(line 24)-64(line 20), 72(line 16)-73(line 24)). Both Maldonado and Roarke were incapable of identifying objects in representative photos (R. X: 106 (line 17)-110(line 6), 139(line 25)-140(line 8), 172(line 9)-

174(line 8); XII: 132(line 3-12), 134 (line 15)- 138(line 13), 177(line 25)-178 (line 9)). The linkage of the Dickens' box to the Williams' boxes is based on inferences contrary to the reasonable jury findings.

3. Scooter Williams

UPS also unreasonably inferred, contrary to the jury's findings, a link between Dickens and Scooter Williams on November 5, 1985, based upon the fact that the two were acquaintances in the past. However, just as the boxes cannot link Dickens to Williams, the alleged involvement of Scooter Williams does not implicate Dickens. Williams, like Dickens was acquitted of the theft charges brought by UPS; however, Williams, unlike Dickens, was paid money to settle his lawsuit against UPS (No. 86-4456 in the United

States District of Texas, Houston Division).

In fact, the involvement of Williams does more to discredit Maldonado than Dickens. Maldonado claims to have identified Williams, but could not see the license plate of the car he said Williams left in. (R: XII: 74(line 21)-75(line 10), 150(line 13-151(23). Maldonado's "bad blood" with Williams and promptness in trumping up perjury charges against an alibi witness for Williams discredited his veracity (R.X: 155(line 13)-157(line 2), Plaintiff's Ex. O). The record was also replete with evidence of the animosity borne by Maldonado for Dickens (R.X: 54(line 1-3), 146(line 18)-149(line 13), XI: 90(line 19)-94(line 5)). When viewed in context with the evidence of UPS's intimidation and lying (R.X: 45(line 20)-48(line 25), 177(line 10)-184(line 23),

XI: 90(line 19)-92(line 25), XII: 60(line 3)-64(line 17), 85(line 24)-88(line 9)), the jury's credibility evaluations as to Maldonado appear eminently reasonable.

4. The Police Station

The final piece of evidence relied on by UPS and the Fifth Circuit is the mysterious phone call placed to police headquarters by Williams. Only by engaging an inference contrary to the jury verdict can this call implicate Dickens. The "odd" call was directed to Roarke, not Dickens (R.XII: 158(line 4)-159(line 20), Plaintiff's Exhibit O). A reasonable inference from the call is that Williams, having obviously learned of the events at UPS on November 6, placed a call to the UPS police officer involved and asked "what happened" (R. XII: 159(line 11)). The call in no way supports a finding of probable cause to arrest Dickens. This is

particularly true given the fact that Dickens had already been arrested.

The Fifth Circuit built on this evidence and concluded that Williams "arrived at the police station with an attorney for Dickens." (Op: 6) There is no evidence of such an occurrence anywhere in the record of the second trial. This finding by the Fifth Circuit further demonstrates their abuse of Gerry Dickens' due process rights.

CONCLUSION

Accordingly, because the Fifth Circuit used the wrong record to review this case, the writ should be granted. Respondent cannot ignore the constitutional infirmity by parading their version of the facts before the court. The proper place for their argument is before a panel of the Fifth Circuit

employing the correct record of the trial court proceedings.

Respectfully submitted,

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